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IN THE

SUPREME COURT

OF THE

UNITED STATES

HOMER E. GRAFTON,
Plaintiff in Error,
VS.
THE UNITED STATES,
Defendant in Error.

NO. 358

BRIEF OF PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

HOMER E. GRAFTON,
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THE UNITED STATES,
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NO. 358.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff in error is a citizen of the United States and while within its confines, he enlisted as a soldier in the army thereof. He was charged in the court of First Instance for the Province of Iloilo, Island of Panay, Philippine Islands, with the crime of assassination. The alleged offense was committed within a military reservation, on the Island of Guimeras, in the Philippine Archipelago, on the 24th day of July, 1904. At the time of the commission of the acts complained of, the soldier was in the performance of his duty as a sentinel, duly posted by proper military authority, guarding military stores and property of the United States.

During the day the plaintiff in error observed various movements on the part of natives about the reservation, which seemed to him suspicious and which excited his apprehension; his state of mind is manifested by the testimony, that just prior to the occurrence of the fatal incident he reported these matters to the Corporal of the Guard, requesting the Corporal to report the same to the commanding officer. Shortly after making this report, the soldier observed at about eighty yards distant two natives approaching him along his beat, which was upon the military road passing through the reservation. As these natives approached, he observed one of them draw a large knife or bolo from his breast and conceal it behind his forearm.

Apprehending attack, the soldier continued walking his post but crossed over to the opposite side of the road to allow the natives to pass in peace and at a distance, if such was their intent. When within about twenty-five or thirty feet of the sentinel, however, the natives rushed upon him, the leader having drawn the bolo for attack. The soldier promptly fired two successive shots, loading from his magazine, first upon the native bearing the bolo, and then upon his companion. The two shots were fired within less than five seconds, both were effective and both natives died of the wounds so received.

The evidence shows that plaintiff in error is an experienced soldier, having served with our Army in the China campaign before the walls of

Pekin, and in many parts of the Philippine Islands —that he was regarded as a cool and steady man of most excellent character.

The killing of the second native, Felix Villanueva, constitutes the offense charged.

The civil authorities at Iloilo, Panay, were promptly notified of the occurrence by the commanding general of the military department (Visayas) in which the alleged offense was committed, and trial of the case was proffered to the Court of First Instance for the Ninth Judicial District. Civil jurisdiction, however, being declined, a general court-martial was convened in due course by the proper military authority, and the plaintiff in error was brought to trial before that tribunal under the sixty-second Article of War, upon two specifications alleging respectively manslaughter in the case of each native killed.

By that court the plaintiff in error was acquitted and upon review the acquittal was approved by proper military authority and so published in appropriate orders issued from Headquarters Department of the Visayas, Philippine Islands.

Subsequently the civil authorities at Iloilo, being dissatisfied with the result of the trial by the military tribunal, charged the plaintiff in error with the assassination of Felix Villanueva, the second native shot, and demanded that he should be delivered by the military authorities for trial.

This demand was acceded to. Upon being brought before the Court of First Instance, the plaintiff in error demurred to the indictment and denied the jurisdiction of the court, upon the grounds, among others:

a. *Because the act constituting the alleged offense was done by a soldier of the United States in performance of his duty under the laws of the United States.*

b. *Because he was entitled to his constitutional privilege of trial by jury.*

c. *Because he could not legally be brought to trial by any court, other than a military tribunal, except on an indictment found and presented by a grand jury.*

The demurrer and denial were overruled. The plaintiff in error then pleaded specially in bar of trial the record of his previous trial and acquittal of the same offense by a general court-martial, which plea was likewise overruled.

Plaintiff in error then pleaded not guilty to the merits, and was found guilty of homicide and sentenced to "imprisonment in such prison as the law directs for the term of twelve years and one day, and to pay the cost of the prosecution and to suffer all the other accessories of said sentence."

From this finding and sentence of the Court of First Instance of the Ninth Judicial District

of the Philippine Islands, plaintiff in error appealed to the Supreme Court of the Philippine Islands, assigning error on the part of the Court of First Instance in overruling his demurrer and plea of *autrefois acquit* and in the finding of guilty upon the merits of the case.

This appeal was argued in the Supreme Court of the Philippine Islands on the tenth of August, 1905, re-argued January 25, 1906, and a decision affirming the sentence of the lower court was rendered by a divided court on April 3, 1906.

ASSIGNMENT OF ERROR.

Now comes the plaintiff in error and makes the following assignments of error, which he avers occurred upon the trial of the case, to-wit:

I.

The court erred in holding that the plaintiff in error had not been twice put in jeopardy of punishment for the same offense.

II.

The court erred in holding that the plaintiff in error, though an enlisted man of the Army of the United States, and being at the time of the alleged offense in the Philippine Islands by virtue of military orders, could be tried by the civil courts of the Philippine Islands without a jury, notwithstanding the guarantees provided by Section 2, Article III of the Constitution of the United States

of America, and Article V and VI of the Amendments thereto.

III.

The court erred in holding that the civil courts of the Philippine Islands have jurisdiction to try a soldier of the United States for an act done in the performance of military duty imposed under the Constitution and laws of the United States.

IV.

The court erred in holding that the act of the plaintiff in error, committed without malice and in the honest and reasonable belief that he was performing his duty, constituted an infraction of Article 404 of the Penal Code of the Philippine Islands, and the crime of homicide.

I.

THE PLAINTIFF IN ERROR, HAVING BEEN TRIED AND ACQUITTED OF THE ALLEGED HOMICIDE BY A LAWFULLY CONSTITUTED COURT, HAVING JURISDICTION OF HIS PERSON AND THE SUBJECT MATTER OF THE OFFENSE, HIS SECOND TRIAL UNLAWFULLY PUT HIM IN JEOPARDY OF PUNISHMENT A SECOND TIME FOR THE SAME OFFENSE, IN DIRECT VIOLATION OF THE 5TH ARTICLE OF THE AMENDMENTS TO THE CONSTITUTION, AND SECTION 5 OF THE ACT OF CONGRESS OF JULY 1ST, 1902, (32 STAT. AT L. 691, CHAP. 1369.)

Upon being brought to the bar for arraignment in the court below, the plaintiff in error submitted the following plea in bar:

> The accused, as a special plea in bar of these proceedings, submits herewith a duly certified copy of the judgment of a general court-martial, duly convened by Special Orders, No. 152, dated Headquarters Department of the Visayas, Iloilo, Panay, Philippine Islands, showing that he has heretofore been tried for and acquitted of the identical offense alleged in the indictment, as, by the record thereof, more fully and at large appears, which said judgment still remains in force and effect, and not in the least reversed or made void.

The indictment, or charge, upon which the defendant was arraigned, tried and acquitted by the general court-martial was as follows:

> *Charge*:—Violation of the 62d Article of War.

Specification 1.—In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully and feloniously kill Florentino Castro, a Filipino, by shooting him with a United States Magazine rifle, caliber 30.

This at Buenavista Landing, Guimeras, P. I., July 24th, 1904.

Specification 2.—In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully and feloniously, kill Felix Villanueva, a Filipino, by shooting him with a United States Magazine rifle, caliber 30.

This at Buenavista Landing, Guimeras, P. I., July 24th, 1904.

Upon the judgment of acquittal, the following order was made by the reviewing authority, the Commanding General, Department of Visayas:

HEADQUARTERS DEPARTMENT OF THE VISAYAS.

Iloilo, Panay, P. I., August 25th, 1904.

Special Orders, No. 167.

EXTRACT

* * * *

4. Private Homer E. Grafton, Company G, 12th U. S. Infantry, having been tried by a general court-martial convened at Camp Jossman, Guimeras, P. I., and found not guilty of manslaughter in violation of the 62d Article of War, was acquitted.

> In the foregoing case, the acquittal is approved. Private Grafton will be released from confinement and restored to duty.
>
> By Command of Brigadier General Carter:
>
> D. A. FREDERICK,
> *Major, Assistant Adjutant General,*
> *Adjutant General.*

The plaintiff in error thus having been tried and acquitted of the homicide of Felix Villanueva by a court of competent jurisdiction, it is submitted that he was protected, both by the Constitution of the United States and the organic law of the Philippine Islands, from being a second time placed in jeopardy of punishment for the same offense.

Our courts have always guarded, with jealous care, the constitutional right of accused persons, not to be twice placed in jeopardy for the same offense. As was said by Mr. Justice Miller in *Ex Parte* Lange, 18 Wallace, 205:

> There is no more sacred duty of the court, than in a case properly before it, to maintain unimpaired those securities for the personal right of the individuals which have received for ages the sanction of the jurist and the statesman; and in such case no narrow or illiberal construction should be given the words of the fundamental law in which they are embodied.

By Article V of the Amendments to the Constitution of the United States, it is provided, *

* * "nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb."

The reservation of this constitutional right in the Act of Congress of July 1st, 1902, the organic law of the Islands is still stronger.

> Section 5. * * No person shall be held to answer for a criminal offense without due process of law; and no person for the same offense, shall be twice put in jeopardy of punishment.

Bishop, in his work on Criminal Law, Vol. 1, Sec. 979, says:

> One who, in a judicial tribunal, has been convicted, acquitted, or put in what the law terms jeopardy in respect to a real or supposed crime, can not be further or again pursued for it, except by some step in the proceeding he waived his right to rely on this immunity.

This precious right our forefathers brought with them to America from English shores, and their descendents have again transplanted it in those distant islands, where let us trust it will be nourished and fostered, and not permitted to wither and perish. So steadfastly has this right been maintained in the adjudicated cases, that it seems strange that it should again be brought in question. It would seem that it should be sufficient in this case to cite the recent decision of the Supreme Court of the United States in the Kepner case. 195 U. S. 100; 49 L. Ed. 114.

In speaking of the attempt on the part of the representatives of the government to give in that case to the words used in the organic law of those Islands, any other than that plain meaning which has always been given them by the courts, and which even the wayfaring man may understand, though he be not learned in the law, Mr. Justice Day says:

> How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudications in the courts of this country, and the maintenance of which has been ever deemed essential to our government, could be used by congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken? It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision is presumed to be used in that sense by the legislative body.
>
> (The Abbotsford, 92 U. S. 440.) * * * The learned justice continued, going to the merits of the case, that the common law "Protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction has acquitted the accused of the offense." The rule is thus stated by Hawkins, Pleas of the Crown, quoted by Mr. Justice Story in *U. S. vs. Gilbert* (2nd Sumner, 39); "The plea (says he) of *autrefois*

acquit is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offense more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal free from error and well commenced before any court, which hath jurisdiction of the cause, he may, by the common law, in all cases, plead such an acquittal in bar of any subsequent indictment or appeal for the same crime. In this court it was said by Mr. Justice Miller, *Ex Parte* Lange, (18 Wallace, 163):

The common law not only prohibited a second punishment for the same offense, but went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted. * * * It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority as well as decision of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before tribunal properly organized and competent to try him, certainly so, after acquittal." (*Coleman vs. Tennessee*, 97 U. S. 509.)

Undoubtedly in those jurisdictions where a trial of one accused of crime can only be put to a jury and a verdict of

> acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, it is obvious where one has been tried before a competent tribunal having jurisdiction, he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict.
>
> (*People vs. Minor*, 144 Ill. 308; *State vs. Bowen*, 45 Minn. 145; *State vs. Lange*, 96 Tennessee, 668.

In the case of *U. S. vs. Colley*, No. 1303, Decisions of the Supreme Court of the Philippine Islands, the question involved in this case has been ably presented. In that case the accused had been duly tried and convicted by a general court-martial, having jurisdiction of the cause. It having been impossible to enforce the death sentence imposed by the military court by reason of the transition of military authority, the defendant was duly indicted in the civil courts for the same offense and brought to trial. The court in a very able decision held as follows:

> If the tribunal has authority either concurrently with another or exclusive, whether it is an inferior one as a justice's court, a court-martial, or a court of a municipal corporation, or is a superior one—a conviction or acquittal in it will be a bar to a subsequent proceeding in whatever court undertaken.

(*I Bishop's Criminal Law*, Sec. 1029; *Commonwealth vs. Roby*, 12 Pick. Mass. 496.)

The acquittal of the accused by a court-martial is a bar to subsequent indictment in courts of common law for the same offense, the tribunal acquitting being competent to acquit.

(*Wilkes vs. Dinsman*, 7 How. U. S. 123.)

There are, however, numerous decisions of Federal and State courts holding that by the same act, a person may commit two crimes, may offend at the same time two sovereignties—that of the United States and that of the State in which the offense is committed. From this doctrine the conclusion was reached that therefore there could be two trials of the accused for the same act, one in the courts of the United States, and the other in the State tribunal also, and as a consequence two punishments.

This doctrine has been applied in such offenses as passing counterfeit money, harboring fugitives, illegal sale of liquor, etc. (*State vs. Rankin*, 4 Golden Tenn., 410; *Fox vs. Ohio*, 5 How. U. S., 410; *Baron vs. Mayor*, 7 Peters U. S. 243; *Moore vs. People of Ill.* 14 How. U. S. 13.)

Conceding this to be an exception to the general rule that an offender shall not be tried twice for the same offense

against his will, it is not applicable in this Colley case, and for the reason that there is no dual sovereignty in these Islands; and there is only one to be offended—The United States—for which and in the name of which the Commissioners in the Philippine Islands as well as courts-martial act.

At the time of the shooting in question, the Commission enacted laws "By authority of the President of the United States."

So here, there is but one offense, that against the United States, and when that Government chooses the tribunal in which to try an offender, when the trial takes place in that tribunal and when the accused is convicted and sentenced, he cannot again be put in jeopardy in another court of the same sovereign.

It follows that the defendant having been once in jeopardy cannot be tried again for the offense of which he was formerly convicted.

The present Supreme Court of the Islands endeavors to differentiate between that case and this, upon the ground that the former occurred in time of war and the latter in time of peace. In this attempted differentiation the crucial point of the case is lost sight of—the jurisdiction of the Court. In the former case the jurisdiction of the military court was exclusive, while concurrent in the latter.

This doctrine is cited with approval in a note to Kent's Commentaries, Vol. I, page 341.

> If they (the Civil Courts) had (jurisdiction), an acquittal by a court-martial would be a bar to any criminal proceedings in any other court.

And in the case of *Wilkes vs. Dinsman*, 7 Howard, 123, which arose upon an action of trespass against Commodore Wilkes for an alleged assault upon a marine, and in which the copy of the record of a general court-martial by which the defendant had been acquitted of the same offense was offered in evidence, and rejected by the civil court, it was said by Mr. Justice Woodbury on the appeal to the United States Supreme Court, "we think that such proceedings were not conclusive on the plaintiff here, *though a bar to subsequent indictment in the courts of common law for the same offense.*"

The case relied on in support of the contrary view of this question is that of the *United States vs. Cashiel*, 25 Fed. Cases, 318, No. 14744; s. c. 1 Hughes 552. It is true, that in this case the learned District Judge who wrote that opinion does express an opinion hostile to our position; but, by way of comment it might be suggested that upon a careful analysis of the case, it will be seen that while the point is discussed, the decision was based chiefly upon the ground that the two offenses were not, in the Court's view, really identical. Two distinct and independent laws had

been violated by the defendant, to-wit: The 57th Article of War, enacted by Congress in 1806, making it a military offense to hold any correspondence with, or give any intelligence to the enemy; and a penal act of Congress, of 1862, making it a crime to give aid and comfort to the rebellion. The two offenses the Court held, were in no sense identical, as the facts, upon which conviction could have been had under the 57th Article of War would not have supported a conviction under the act of 1862. One offense was purely military, while the other and greater was made treason by the Act of Congress; the military court might have tried the offender for both offenses; but, as a matter of fact, had tried him for the lesser and military offense only. But even if that case was held to be an authority against us it stands alone among our adjudications upon this subject.

Moreover, the case of *Moore vs. Illinois*, 14 Howard, 17, cited by the Court in Cashiel's case, fails utterly, upon examination, to support the conclusion of that court upon the point in question. In the Illinois case, the point decided was simply that a person committing an act, which violated both a State and Federal law, was amenable to both jurisdictions, and could be punished by each. This conclusion was based upon the well known and familiar doctrine of dual sovereignty. As is said in the opinion of the court, "Every citizen of the United States is also a citizen of a State or territory * * * and may be liable to punishment for the infraction of the laws of either.

The same act may be an offense or transgression of the laws of both." It is seen therefore, that this case does not even remotely support the contention, that a person may be twice placed in jeopardy of punishment for the same offense against the same sovereign.

It is submitted, therefore, that the doctrine announced by the District Court in Cashiel's case is neither supported by the facts of that case, nor precedent of law; and that, on the contrary, the law has been correctly declared in the cases of Kepner and Colley, *supra*.

FORMER TRIAL

It is respectfully submitted, that it remains for plaintiff to establish that he has been tried and acquitted:

(a). *By a lawfully constituted court, having jurisdiction of his person and the subject matter.*

(b). *Upon a valid indictment.*

(c). *For the same offense alleged in the indictment upon which he was tried in the court below.*

(*a*)

Was the general court-martial which tried the accused lawfully constituted, and vested with jurisdiction of the person of the accused and the subject matter of the offense?

This is the crucial point:

That general courts-martial have jurisdiction

of crimes, as well as purely military offenses, when committed by persons of the military establishment is well settled and has long been accepted by the Supreme Court of the United States.

It may be well, however, to make a brief *resume'* of the authority whence this power has been drawn, and the precedents wherein it has been upheld.

The Constitution of the United States provides in Section 8, Article 1, that "Congress shall have power to make rules for the government and regulation of the land and naval forces." Pursuant to such power Congress, by statute, has enacted rules for the government and regulation of the Army, known as "Articles of War," Section 1342, R. S. Article 2 of said Section provides:

> Article 2. These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: "I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war." This oath may be taken before any commissioned officer of the Army.

The force and effect of this oath, which every enlisted man is required to take voluntarily within six days after his enlistment is to place the soldier directly within the power of courts-martial to try and determine any offense he may have committed in contravention of the Articles of War.

Ex parte Milligan, 71 U. S. 123.

When therefore a court-martial has been instituted for the purpose of trying any person in the military establishment for any offense, and that offense is shown to have been perpetrated while such person is subject to the rules and regulations of the Army, then it must be conceded that the court has full jurisdiction and power to arraign, try and sentence the offender pursuant to the provisions of said Article of War; and that power is as inherent in that court, as the power of any civil court to arraign, try and sentence any person for an offense against the civil law of which it has cognizance. In other words, courts-martial are lawful tribunals authorized by the Constitution, and have as complete power and authority to try and finally determine any cause before them over which they have jurisdiction, as any other court under the Constitution of the United States.

It has been uniformly held by the civil courts, that the jurisdiction of courts-martial over offenses in violation of the Articles of War is as inherent as that of any court constituted under the Acts of Congress.

In *Ex parte* Davison, 21 Fed. Rep. 620, Judge

Wallace, discussing the powers of courts-martial, says:

> Courts-martial are lawful tribunals existing by the same authority that this court is created by, have as plenary jurisdiction over offenses by the law military as this court has over controversies committed to its cognizance, and within their special and more limited sphere are entitled to as untrammeled an exercise of their powers.

In *Ex parte* Reed, 100 U. S. 13, which appertains to the use of the writ of habeas corpus to review the proceedings of a naval court-martial, the Court held:

> The court had jurisdiction over the person and the case. It is the organism provided by law, and clothed with the duty of administering justice in this class of cases. * * Its judgments, when approved, as required, rest on the same basis and are surrounded by the same consideration which gives conclusiveness to the judgment of other legal tribunals including as well the lowest as the highest, under like circumstances.

In Re McVey, 23 Fed. Rep. 878, it is held:

> It is not denied that within the sphere of their jurisdiction, the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort.

So much for the general power and jurisdiction of courts-martial.

It follows, that as the plaintiff belongs to the military establishment, the general court-martial by which he was tried unquestionably had jurisdiction of his person. But it is gravely contended by the appellee that, while the general court-martial has jurisdiction to try military offenders, such jurisdiction is limited to offenses of a military character in the nature of infractions of military discipline, and that, in time of peace, it is without jurisdiction of crimes *per se*, or in other words offenses against the peace and dignity of the State.

On the contrary we contend that the jurisdiction of the general court-martial is not so limited; and that in time of peace, its jurisdiction extends under the 62d Article of War to all crimes not capital, as well as to those purely military offenses constituting conduct to the prejudice of good order and military discipline—the jurisdiction of the particular crime being derived from the fact of its having been committed by a person belonging to the military establishment.

The 62d Article of War reads as follows:

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field officers' court-martial,

> according to the nature and degree of the offense, and punished at the discretion of such court.

Let us inquire as to the scope of this article.

The Articles of War were not designed to be a complete penal code enumerating all the offenses of which officers and soldiers may be guilty. Some of the most serious offenses are not specifically mentioned; for instance, officers making false reports or statements, or signing false certificates; and no specific article exists for the punishment in time of peace of the numerous offenses laid down in the 58th Article of War, the provisions of which are limited to time of war. But the 62d Article of War is comprehensive enough to supply this deficiency and it has been so construed by the highest authority.

> Its policy is to provide a general remedy for a wrong which had not elsewhere been provided for.
>
> Samuel's Mil. Law, p. 688, 1816.
>
> There is scarce any impropriety of conduct or irregularity which an officer or soldier may commit that may not be brought under the 70th Article of War.
>
> Kennedy's Mil. Law, p. 34, 1847.

(This article is the English Article of War from which the present 62d of the American Articles was taken.)

> The 70th Article of War is the most useful of the whole.
>
> Napier's Remarks on Mil. Law, p. 58, 1837.

The language used by Chief Justice White in *ex parte* Mason, 15 Otto, 696, (s. c. 105 U. S. 696, 26 L. 1213) is particularly applicable to the case at bar. Mason, who was sergeant of the guard, assaulted and attempted to assassinate Guiteau, the assassinator of President Garfield, and was in due course tried by general court-martial, convicted, and sentenced to be dishonorably discharged from the service and confined in a penitentiary for eight years. His case was brought up on writ of habeas corpus before the Supreme Court of the United States, and the contention made in his behalf that military tribunals had no jurisdiction *per se* of other than military offenses.

> The choice of the tribunal by which he (Mason) is to be tried has not been given to the offender. He has offended both against the civil and the military law. As the proper steps were not taken to have him proceeded against by the civil authorities, it was the clear duty of the military to bring him to trial under that jurisdiction. Whether, after trial by the court-martial he can be again tried in the civil courts, is a question we need not now consider. It is enough if the court-martial had jurisdiction to proceed, and what has been done is within the powers of that jurisdiction. It is objected that the sentence is in excess of what the law allows. The 97th Article of War is as follows:

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory or District in which such offense may be committed, or by the common law, as the same extists in such State, Territory or District, subject such convict to such imprisonment."

Under this Article when the offense is one not recognized by the laws regulating civil society, there can be no punishment by confinement in a penitentiary. The same is true, when the offense, though recognized by the civil authorities, is not punishable by the civil courts in that way. But when the act, charged as "conduct to the prejudice of good order and military discipline," is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear, a court-martial is authorized to inflict that kind of punishment. (The italicizing is ours.) *The act done is a civil crime and the trial is for that act.* The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only *criminal, according to the laws of the land, but prejudicial to the good order and discipline of the Army to which he belonged.*

See also *Carter vs. Roberts*, 177 U. S. 496.

Carter vs. McClaughry, 183 U. S. 365.

In the latter case Chief Justice Fuller in the opinion at page 397 said in passing upon the jurisdiction of courts-martial in cases arising under the 62d Article of War:

> The construction would not be unreasonable if it were held that the words "though not mentioned in the foregoing Articles of War" meant "notwithstanding they are not mentioned," and that the article was intended to cover all crimes, whether previously enumerated or not. The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline.

And in the light of these authorities, it would seem that the jurisdiction of the general court-martial over the subject matter of the offense—manslaughter—is beyond question.

As we have seen, the only limitation, in time of peace, which is placed upon courts-martial as to crimes properly cognizable under the 62d Article of War, is that such crimes shall be "not capital." In other words, in time of peace, courts-martial may not impose the death penalty, under this Article.

Under the 58th Article of War, in time of war the jurisdiction of military courts of the crimes therein enumerated is exclusive. In peace, under

the 62d article, such jurisdiction is concurrent as to all the crimes "not capital," enumerated in the 58th article.

(*b.*)

The charge and specifications upon which the plaintiff was arraigned and tried in the general court-martial, conformed to the pleading and practice of military courts, was sufficient to support a valid judgment, and cannot be attacked in any collateral proceeding.

Neither this court, or any other civil tribunal has jurisdiction or authority to adjudicate any question relative to the sufficiency of the pleading and practice of courts-martial, or to undertake any inquiry as to the proceedings of a court-martial, except for the purpose of ascertaining two things: First, whether the court had jurisdiction of the person, and the subject matter of the offense. Second, whether, having jurisdiction and having arrived at its conclusions, the sentence imposed is warranted by law. A court-martial, as a legally constituted court, having the jurisdiction, has the right to determine for itself the practice and procedure under the Articles of War, and whether or not the charges and specifications are properly pleaded.

In re McVey, 23 Fed. Rep. 878, the court said:

> The only authority of the civil courts is "to inquire whether the military authorities are proceeding regularly within

> their jurisdiction. If they are, we cannot interfere, no matter what errors may be committed in the exercise of their lawful jurisdiction."

In re Eckart, 166, U. S. 492, it was held:

> That a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment, is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned upon habeas corpus, because lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime.

In the case at bar, however, we are not aware that the validity or sufficiency of the indictment, upon which the plaintiff was tried and judgment rendered by the court-martial, has been ever questioned.

(*c.*)

Is the offense with which the plaintiff is charged, and for the commission of which he now stands in jeopardy of punishment, in fact identical with that of which he was acquitted by the judgment of the general court-martial?

The rule of law on this point is clearly stated by the text writers, and has been applied in a host of cases arising in nearly every state of the Union. In some respects the precedents are conflicting,

but it seems that the weight of authority sustains the rule as laid down in the American and English Enc. of Law, Vol. 2, p. 247, where it stated:

> On a plea of former acquittal, the true test to determine whether the accused has been put in jeopardy for the same offense is, whether or not the facts alleged in the second indictment, if proven to be true, would have warranted a conviction on the first indictment, or whether or not the second case is precisely the same transaction as the first.

The test was applied in the following cases:—

In *Hoffman vs. State*, 20 Md. 425, it is said:

> Article 5 of the Amendments to the Constitution of the United States, viz:—"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"—means nothing more than that when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant cannot be a second time placed in jeopardy for the particular offense.

In *Holt vs. State*, 38 Ga. 137:

> The plea of *autrefois acquit* is sufficient whenever the proof shows the second case to be the same transaction as the first, athough the offense is called by another name.

In *State vs. Cooper*, 13 N. J. Law, 361:

(Opinion p. 371.)

> Upon this principle, are founded the plea of *autrefois acquit*, and *autrefois convict*. The writers on the subject concur in stating that these pleas "must be upon a prosecution for the same identical act and crime," 3 Bl. Com. 336, Ch. C. Law, 1st vol. p. 452, 462. But, says Chitty, p. 455, "It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment for manslaughter upon the same person, because the latter charge was included in the former, and if it had so appeared on the trial the defendant might have been convicted of the inferior offense; and on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design.

In *State vs. Cameron*, 50 Tenn. 78:

> A person's acquittal on an indictment for the embezzlement of revenue by "falsely pretending that said revenue was taken from him by robbery" is a bar to a subsequent indictment for failing to pay over the same moneys.

In *Dill vs. People*, 36 Pac. 229 (Colo.) it is held:

> In determining whether or not a plea of *autrefois acquit* is sufficient in law in a case of this kind, the following may generally be regarded as the proper test: Was the matter set out in the second indictment admissable as evidence under the first, and could a conviction have been properly maintained upon such evidence? If yes, then the plea is sufficient; otherwise, it is not.

Wilson vs. State, 24 Conn. 57.

> Generally, to constitute a legal identity between the two offenses, so as to make an acquittal or conviction of one an available defense against a prosecution for the other, it is necessary that the averments of the second information should be such that, if proven, they would have warranted a conviction under the first.

Roberts vs. State, 14 Ga. 8.

> The plea of *autrefois acquit* is sufficient where the evidence necessary to support the second indictment would have sustained the first, and also whenever the proof shows the second case to be same transaction as the first.

State vs. Keogh, 13 La. Ann. 243.

> The test as to whether the plea of *autrefois acquit* is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.

Commonwealth vs. Morgan, 9 *Kulp* (Pa.) 573.

Commonwealth vs. Robey, 29 Mass. 496.

Commonwealth vs. Wade, 34 Mass. 395.

State vs. Birmingham, 44 U. S. 120.

Price vs. State, 19 Ohio, 423.

State vs. Copeland, 46 S. C. 13.

Parchman vs. State, 2 Tex. App. 228.

Now, upon the application of the rule of construction established by these authorities to the facts of the case presented in this form, can any doubt remain as to the identity of the offense alleged in the indictment with that for which the plaintiff was tried by the court-martial? Is it not the same transaction? The two cases rest upon the same facts, and have been testified to by the same witnesses. The accused is the same, and he is charged with the homicide of the same person, at the same time and place, and under the same circumstances. What more could be asked to establish the identity of the transaction set forth in the two records?

But we are told, that though the facts upon which the two cases rest are the same, yet the offense is not identical, inasmuch as the charge in the Court of the First Instance was "assassination" while in the military court it was "homicide".

In reply to this proposition, it is respectfully submitted that the government cannot legally,

for the same transaction, put a person in jeopardy a second time by simply calling the offense another name. The principle of construction in this respect is said to be:

> But when the legal bar has once attached, the Government cannot avoid it by varying the form of the charge in a new accusation. If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attaches to the first must constitute a protection against the trial on the second. (Cooley's Cons. Lim. 401.) And

> If it appears that the second case is for the same transaction as the first, it is immaterial if the offense is called by a different name. A. E. E. Law, Vol. 11, p. 935, 1st Ed.

It is not necessary to establish the defense "*autrefois acquit*" or "*convict*" that the offense in each indictment should be the same in name. If the transaction is the same, or if each rests upon the same facts between the same parties, it is sufficient to make good the defense.

Bishop Crim. Law (7th Ed.), Sec. 1050.

Hirschfield vs. State, 11 Tex. App., 207.

Moore vs. State, 71 Ala. 307.

Holt vs. State, 38 Ga. 187.

But even granting the validity of the charge of "assassination" or "murder" against the accused, he having once been tried for the lesser offense of "manslaughter," which is included in the greater offense of murder, cannot legally be put in jeopardy a second time upon an indictment charging the greater offense of "murder."

> Where a greater offense includes a lesser one, being placed in jeopardy under an indictment for the included offense only, constitutes a bar to a prosecution for the greater offense; so, upon a trial for the higher grade of an offense consisting of degrees, if the defendant is convicted of an inferior grade, such conviction operates as an acquittal of, and will bar a subsequent prosecution for any of the higher grades; and where such a conviction is reversed and a new trial ordered, the new trial must be confined to the particular charge upon which the defendant was found guilty on the former trial. American and English Encyclopedia of Law, Vol. 11, p. 939, 1st Ed. See also numerous authorities there cited.

> A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offense, or for an offense of a higher degree, and necessarily including the offense for which the accused stands indicted. It follows that a con-

> viction or acquittal for a minor offense is no bar to a prosecution for a greater offense, *except in the case of acquittal for manslaughter which would bar an indictment for murder, for the reason that if the defendant was innocent of the killing, without malice, he could not be guilty of the killing with malice. Scott vs. U. S. Morris*, 142; *Hunt vs. State*, 25 *Miss.* 378; *Burns People*, 1 *Parker*, 182.

State vs. Foster, 33 *Iowa*, 526.

In *Commonwealth vs. Roby*, 12 Pickering, (Mass.), in the opinion at page 503, the Court says:

> Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder. 1 Stark, Cr. Pl. (2d Edit.) 322.

In 12 Cyc. 280 it is said:

> The general rule is somewhat vaguely stated to be that the plea of former

conviction or acquittal must be upon a prosecution for the identical act and crime. This is to be qualified, however, by the statement that the two charges need not be precisely the same in point of degree, for it is enough if an acquittal of the one shows that the defendant could not have been guilty of the other.

Several rules have been laid down by the authorities for determining whether the crimes are identical. One test is to ascertain whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, and if this is the base, then the crimes are assumed to be identical. Another test is to inquire, where the two crimes are not the same, whether they grow out of the same transaction; but this test is correct only in a general way, as a single act or transaction may contain elements, each of which are crimes at common law or under different statutes. The safest general rule is that the two offenses must be in substance precisely the same, or they must be of the same nature or the same species, so that the evidence which proves the one would prove the other; or if this is not the case then the one crime must be an ingredient of the other.

Thus it appears that the law is indubitably that if there is identity of act coupled with identity of result and a charge based thereon is tried by a court of competent jurisdiction, that ends

the matter; and no further trial can lawfully be had by that or any other court.

An acquittal for voluntary manslaughter is a bar to a future prosecution for murder. *Com. vs. Neely*, 2 Chest. Co. Rep. Pa. 191.

In this case, however, the identity of the two alleged offenses has been fixed and determined by the trial judge in the court below beyond all peradventure; for, though charged there with "assassination" he found the plaintiff guilty "of an infraction of Article 404 of the Penal Code, and of the *crime of homicide*," *which is the identical offense that the accused was acquitted of by the court-martial.*

We submit, therefore, that the double jeopardy of punishment in which the plaintiff has been put is actual and real.

Had he been found guilty by the court-martial, he might have been subject to a punishment of life imprisonment in Bilibid, while the court of First Instance has imposed a sentence of twelve years and one day.

Let us suppose that a conviction had been had by the court-martial, and a sentence of five years' imprisonment imposed upon and served by the defendant, and then he had been brought to trial in the Court of First Instance, convicted and given a term of ten years' imprisonment.

Could it be denied that the defendant had been punished twice for the same offense?

It is asked, therefore, that this court give to the words, "No person for the same offense shall be twice put in jeopardy of punishment," that plain meaning which they have in the jurisprudence of the United States—and which constitutes them that bulwark of human rights which has ever been our safeguard against illegal oppression.

II

OFFICERS AND ENLISTED MEN OF THE UNITED STATES ARMY SERVING IN THE PHILIPPINE ISLANDS BY VIRTUE OF MILITARY ORDERS, ISSUED BY AUTHORITY OF THE CONSTITUTION AND LAWS OF THE UNITED STATES ARE ENTITLED TO THE FULL BENEFIT OF THE GUARANTIES OF THE CONSTITUTION AS TO TRIAL BY JURY.

The guaranties as to trial by jury are found in Art. III, Section 2, of the Constitution, "* * * The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed," and in Article V and VI of the Amendments to the Constitution, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

Can it be that a soldier, whose primary duty, as such, is to uphold the Constitution, which is the basis of the Federal Government, while doing that duty, can be deprived of rights that were his at the time he became a soldier and which he did not then surrender? It must not be forgotten that he was a citizen before he was a soldier and all rights were his that belonged to any citizen. When he enlisted he simply surrendered one right of a citizen and one right only, to-wit: the right of a trial by jury in those cases which the law makes triable by court-martial. When he became a soldier he consented, if he violated, or was charged with violating, any of the Articles of War, to be tried by a court-martial without the intervention of a jury, as that word is usually employed; but he never agreed, and the law did not declare, that when he became a soldier he was deprived of the right of a trial by jury if charged with an offense other than military, and tried by a court other than a court-martial. To hold with the Government in this matter is to say that one, by whose services the Constitution is sustained and the Government lives, has fewer rights than one who simply is a beneficiary of those governmental benefits.

Notwithstanding the decision of this Court in the case of *Dorr vs. The United States*, 195 U. S. 138, we contend that the plaintiff, a soldier of the United States Army, present in the Philippines, not from choice, but taken there without his consent and serving there by orders issued upon authority derived from the Constitution, is entitled to the protection of all of his rights of citizenship, including that of trial by jury, which are guaranteed by the Constitution, and especially as to acts done in the performance of his duty as a soldier.

It seems to us that there is a wide distinction between the case of a civilian, who *voluntarily* elects to go to those islands and take up his residence for pleasure or profit, submitting himself advisedly to the law of the land, and that of a soldier in the Army, who is ordered there by the constitutional authority for the purpose of maintaining the sovereignty of the United States. Can it be true that the officers and men of the Army, who are ordered to this territory for the purpose of maintaining the supremacy of the United States under the Constitution, forfeit their most cherished rights of citizenship by obedience to such orders?

It is true as noted in *Dorr vs. U. S.*, that Congress, in legislating for the Philippines, had expressly provided that Section 1891 of the Revised Statutes of 1878, shall not apply to the Philippine Islands. This is the section giving

force and effect to the Constitution and Laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere in the United States. By strict construction of this Act, it would follow that no provision of the Constitution or Laws of the United States would be effective in the Philippines, except such as are expressly enacted by Congress for the government of the territory. But, can this apply to the provisions of the Constitution and laws that relate to the personnel of the Army? If so, the Army serving in the Philippines, would be subject to no discipline,—no law of the United States, and military courts would be deprived of legal authority for the punishment of military offenders.

The Army is raised and supported by authority of the Constitution (Art. I, Sec. 8, clause 12,) governed and regulated by authority of the Constitution (Art. I, Sec. 8, clause 14), is ordered beyond the boundary of the domestic authority of the United States by authority of the Constitution (Art. IV, Sec. 3, clause 2), and is disciplined under the Articles of War (Sec. 1342, R. S.). Now, it is our contention that to the Army and its personnel, all of these provisions, and *every* provision of the Constitution are ever present. They are effective of themselves and of their own force in all domestic territory of the United States, and they are extended to territory nondomestic or foreign upon the doctrine of exterritoriality.

In this sense, though subject to the sovereignty of the United States, the Philippine Islands are non-domestic or foreign territory, just as much as Cuba is at the present time. This territorial status is established by the decisions of this court in *Dorr vs. U. S.* 195 U. S. 138, and *Downes vs. Bidwell*, 182 U. S. 244. As was said by Mr. Justice Day in *Dorr vs. U. S.* (opinion p. 144), "That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes vs. Bidwell*" * * * * and "The legislation upon the subject shows that * * * * * * Congress has hitherto refrained from incorporating the Philippines into the United States."

And, as held in *Downes vs. Bidwell, supra*, "So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress."

If then it is conceded, as it seems it must be, that the Philippine Archipelago is non-domestic territory to whose people the Constitution and

and laws of the United States not only do not extend of their own force, but from whom they are expressly withheld by Congress, it is submitted, that from the very necessity of the case such Constitution and laws, as far as the Army is concerned, must extend to that territory upon the principle of exterritoriality.

This doctrine of exterritoriality, called by some law writers a fiction of international law, by which certain classes of aliens are exempted from the control of the law in the land of their temporary sojourn, is well established, and is peculiarly applicable to the armed forces of a sovereign power serving in non-domestic or foreign territory, as for instance the Philippines and Cuba. "The organized armed forces of a state, representing its sovereign power, are never subjected to the jurisdiction of another State, if they are temporarily within its territory." Snow International Law, page 23.

> It is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offenses committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow of the case being watched. The existence of a double

> jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evident that there would be some difficulty in carrying out any other arrangement. Hall International Law, page 206.

In *Coleman vs. Tennessee*, 97 U. S. in the opinion p. 509 it is said:

> It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood, said this court in the celebrated case of the Exchange, 7 Cranch, 139, to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: "In such case without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force."

Under this law of exterritorialty, the personnel of the Army and Navy, whether upon the high seas, in a friendly port, or non-domestic or foreign territory, or in enemies' country, wherever they may be by the authority of the United States, are entitled to the protection of the Constitution and laws of the United States, and are answerable under those laws to their sovereign alone.

This principle, as we have seen, is alike essential to the sovereign and to the personnel of its armed forces. Essential to the sovereign for the government, control and discipline of its army, and without which the sovereignty could not be upheld; and essential to the individual soldier for his protection in the enjoyment of the rights guaranteed him by the Constitution, when he is forced by the terms of his enlistment to serve his sovereign in foreign or non-domestic territory.

We therefore submit that the officers and soldiers of the Army do not forfeit their rights of citizenship under the Constitution by reason of their foreign service in the Philippines, but that they are entitled to the protection of its guaranties there, as fully as if they were still within domestic territory of the United States.

III.

THE CIVIL COURTS OF THE PHILIPPINE ISLANDS HAVE NO JURISDICTION TO TRY A SOLDIER OF THE UNITED STATES FOR AN ACT DONE IN THE PERFORMANCE OF MILITARY DUTY IMPOSED UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The principle of law stated in the foregoing proposition is well settled by the Circuit and Supreme Courts of the United States.

This Federal protection is thrown around all officers or agents of the United States Government while in the performance of duty imposed upon them by the Constitution and laws of the United States.

In the case of *In re* Fair, 100 Fed. Rep. 155, where soldiers, whose duty it was to apprehend an escaping deserter, shot and killed the deserter in attempting to make the arrest, and for so doing were held for murder by the State Court of Nebraska, it was held: "If then the petitioners acted under such order in good faith, without any criminal intent, but with an honest purpose to perform a supposed duty, they are not liable to prosecution under the criminal laws of the State."

Again in the Lewis case, 83 Fed. Rep. 159, upon the same principle, it is said by the Court, "where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority,

and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part, he does not become liable to answer to the criminal process of a different government. * * * * With our complex system of government, State and National, we would be in an intolerable condition if the State could put in force its criminal laws to discipline the United States officers for the manner in which they discharge their duties."

And as said by Mr. Justice Strong in *Tennessee vs. Davis*, 100 U. S. 257: "The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents, and they must act within the States. * * * * If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State Court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court, the operations of the General Government may at any time be arrested at the will of one of its members. * * * *

"We do not think such an element of weakness is to be found in the Constitution. The

United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

The same principle is clearly enunciated by Mr. Justice Miller, in Neagle's case, 135 U. S. 1, where it is held, that an officer or an agent of the United States is answerable to the constitutional courts of the United States only for acts done by authority of, or in the discharge of duties arising under, the Constitution and laws of the United States.

See also *In re Grimley*, 137 U. S. 147; *U. S. vs. Clark*, 31 Fed. 710; *In re Waite*, 81 Fed. 359.

Now then, in the light of these decisions, was the accused an officer or agent of the United States, and was the act complained of done in the performance of duties arising under the Constitution and laws of the United States? We submit that this interrogative must be answered in the affirmative.

It has been established, and appears from the record, that the accused was regularly enlisted in

the Army of the United States; that on the 24th day of July, 1904, he had been regularly detailed as a private of the guard, and posted as sentinel by proper military authority; that at the time of the shooting he was walking his post; that he acted entirely without malice; that conditions existed which caused him to believe that the garrison and property of the United States was in danger; and that he honestly believed himself to be attacked by the two natives. Under these conditions the fatal shots were fired; and, it is respectfully submitted that every element was present to bring the incident within the principle of the law established by the cases cited.

Though but an humble soldier, the accused walked his post as the armed representative of the sovereign power of the United States for the purpose of protecting the property and rights of his sovereign, by order of the President of the United States. The attack made upon him was an attack upon the sovereignty of the United States; and, whether or not an error of judgment was made as to the degree of force necessary to repel the attack, the shots were fired by the accused in the discharge of duties devolving upon him under the Federal Constitution and laws.

We therefore contend, in view of the facts, and authorities cited, that the Court of First Instance was utterly without jurisdiction of the person of the accused or of the offense with which he was charged.

These courts of the Philippine Islands are not in any sense constitutional courts of the United States. They are legislative courts, created by virtue of the general right of sovereignty, which exists in the government, or by virtue of that clause of the Constitution which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction, with which they are invested, is not a part of the judicial power which is defined in the third Article of the Constitution, but is that which is specially conferred by Congress.

Reynolds vs. U. S. 98 U. S. 145.

Good vs. Martin, 95 U. S. 90.

Canter's Case, 2 Pet. 552; 7 L. Ed. 517.

McAllester vs. U. S. 141 U. S. 174; 35 L. Ed. 693.

Let us then inquire more particularly as to the jurisdiction of the courts of First Instance over offenses committed by persons of the military establishment.

Under the Spanish Government prior to the treaty of Paris such jurisdiction was specifically withheld.

Article 10 of the Spanish Military Code in force in the Philippines prior to the American occupation, is as follows:

> The Military Courts are the only competent courts to try cases for offenses

not excepted, [and no exceptions are named], committed by military persons of all ranks in active service, and by the employes and officials of the War Department in the same positions, whether they are, the ones or the others, in the exercise of their offices or acting as substitutes, supernumerary or with temporary leave, providing they form a part of the Arms, Corps, Institutions and establishments of the Army, even when of a fortuitous character, while they are dependents of the Ministry of War, and receive salary or pay from the appropriation for the same.

The status and powers of these courts during the period of military occupancy is shown by the following orders:

HEADQUARTERS OF THE PACIFIC AND EIGHTH ARMY CORPS.

Manila, P. I., August 23, 1898.

General Orders
No. 8

EXTRACT

II. The local Courts, continued in force for certain purposes in proclamation from these Headquarters, dated August 14, 1898, shall *not exercise jurisdiction* over any crime or offense committed by any person *belonging to the Army of the United States*, or any retainer of the Army, or person serving

with it, or any person furnishing or transporting supplies for the Army; nor even any crime or offense committed on either or the same by any inhabitant or temporary resident of said territory. In such case, except when courts-martial have jurisdiction, jurisdiction to try and punish is vested in Military Commission, and the Provost Court, as hereafter set forth.

OFFICE OF THE MILITARY GOVERNOR OF THE PHILIPPINE ISLANDS.

Manila, P. I., ~~August~~ October *7, 1898.*

General Orders }
No. 8. }

Until otherwise directed from these Headquarters, the Civil Courts, as composed and constructed by the laws of Spain, which were held and administered prior to August 13, 1898, within Philippine territory now subject to United States military occupation and control, are permitted to resume at once the exercise of the civil jurisdiction conferred by Spanish laws within the limits of that territory, subject, however, to such supervision by the Military Government of the United States, here instituted, as in its judgment the interests of the government may demand. This privilege does not extend to or embrace permission to institute *criminal* proceedings or to exercise criminal jurisdiction of *any nature or character whatsoever.*

OFFICE OF THE UNITED STATES MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS.

Manila, P. I., June 5, 1899.

General Orders
No. 21.

The Courts of First Instance of the Province of Manila, and the Courts of Peace, heretofore held in the city of Manila, P. I., are hereby re-established and will exercise the jurisdiction, civil and criminal, possessed by them prior to August 13, 1898, in so far as compatible with the supremacy of the United States in the Philippine Islands, and the exercise of Military Government therein, and will administer the laws recognized as continuing in force by proclamation from these Headquarters dated August 14, 1898, except in so far as these laws have been, or hereafter may be, modified by authority of the United States.

OFFICE OF THE UNITED STATES MILITARY GOVERNOR IN THE PHILIPPINE ISLANDS.

Manila, P. I., June 17, 1899.

General Orders
No. 22.

I. The Supreme Court of the Philippine Islands and the Courts of First

> Instance and of Peace of the Province of Manila, re-established in General Orders No. 20 and 21, c. s., this office, are announced as open and in the exercise of their jurisdiction, civil and criminal, on and after Wednesday, June 21, 1899. * * * *
>
> II. The *jurisdiction* of the courts specified in paragraph 1, of this order, and of other civil courts which may hereafter be re-established, *shall not extend to include crimes and offenses*, committed by either citizens or of *persons* sojourning within the Philippine Islands, *which are prejudicial to military administration and discipline*, except by authority especially conferred by the Military Governor. Jurisdiction to try and award punishment in the class of cases designated remains vested in provost courts, courts-martial or military commissions.

The foregoing excerpts outline the history of the jurisdiction and powers of Courts of First Instance during the period of military occupancy, and until June 11, 1901.

The present judiciary for the Islands was established under an act passed by the Commission, June 11, 1901:

> Sec. 2. The judicial powers of the government of the Philippine Islands shall be vested in a Supreme Court, Courts of First Instance, and Courts of Justice of the Peace, together with such

special jurisdictions of municipal courts, and other special tribunals as now or hereafter may be authorized by law. The two courts first named shall be courts of record.

Sec. 56. Courts of First instance shall have jurisdiction:—

6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * * * * * * *

Sec. 65. The existing Courts of First Instance are hereby abolished, and the Courts of First Instance provided by this act are substituted in place thereof.

Under this act the jurisdiction of Courts of First Instance was not enlarged to include military offenses. Even had an attempt been made to grant such jurisdiction, the effort would have been, at that time, futile—since that time was one of insurrection; for officers and soldiers of the Army of the United States are not subject to the laws of a State or territory in a state of insurrection against the authority of the United States, nor answerable to its tribunals for offenses committed by them during the war. They are answerable only to their own government, and only by its laws as enforced by its armies, could they be punished.

Coleman vs. Tennessee, 97 U. S. 509.

On July 1, 1902, Congress passed an Act, "temporarily to provide for the administration of the affairs of Civil Government in the Philippine Islands and for other purposes."

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the action of the President of the United States in creating the Philippine Commission and authorizing said commission to exercise the power of government to the extent and in the manner and form and subject to the regulation and control set forth in the instructions of the President to the Philippine commission, dated April seventh, Nineteen Hundred, and in creating the offices of civil governor and vice-governor of the Philippine Islands, and authorizing said civil governor and vice-governor to exercise the power of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, Nineteen Hundred and One, and in establishing four executive departments of government in said islands as set forth in the act of Philippine Commission entitled "An act providing an organization for the department of the interior, of commerce and police, of finance and justice, and of public instruction," enacted September sixth, Nineteen Hundred and One, is hereby approved, ratified and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all

laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: "By authority of the United States be it enacted by the Philippine Commission." The provisions of section Eighteen Hundred and Ninety-one of the Revised Statutes of Eighteen Hundred and Seventy-eight shall not apply to the Philippine Islands.

* * * * * * * * * *

Sec. 9. That the Supreme Court and Courts of First Instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said Government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the Supreme Court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the Commission until otherwise provided by Congress. The judges of the Court of First Instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission; *Provided*, That the admiralty jurisdiction of the Supreme Court and Courts of First Instance shall

not be changed except by act of Congress.

Hence, it seems to us, the conclusion follows, that when Congress vested in the Courts of First Instance such *"jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands,"* and jurisdiction over persons belonging to the Army of the United States, or offenses committed by such persons, never having been *"heretofore provided or prescribed by the government of said islands,"* nor since, for the Courts of First Instance, these courts are clearly without jurisdiction of such persons and such offenses.

It is respectfully submitted that the reasons set forth in the line of decisions quoted *supra* why exclusive jurisdiction of all questions relative to federal authority and acts done by officers and agents of the United States in the performance of duty is vested in the constitutional courts of the United States, are far more potent in the Philippine Islands than in the United States.

If the sovereign power and authority of the federal government under the Constitution, and the official acts of its officers and agents, are jealously guarded in the States composing the Union, and from whom the federal authority derives its power, whose laws are indigenous to American soil and in harmonious accord with the Federal Constitution, and administered by officials, who are necessarily citizens of the United

States, we submit that every element of that sovereignty should be more jealously guarded in the Philippine Islands, but recently subjugated, and not incorporated into the United States, whose citizens are not citizens of the United States, and whose laws are based on the Spanish Code, and are not necessarily administered by citizens of the United States.

In the case at bar, for instance, we have a federal agent,—a citizen of the United States, tried under the Spanish Code, and convicted by three judges, who are not citizens of the United States, for an act done in direct performance of a federal duty.

If it is admitted that the Courts of First Instance are authorized to take jurisdiction of, and hold sentinels or other officers of the United States accountable for acts done by them in the performance of duty imposed upon them by proper constituted authority, it would seem to follow that these courts would have like authority to question the instructions given to sentinels and their superior officer by the commanding officer, as prescribed in the regulation for the army by the President, in virtue of the power vested in him by the Constitution as Commander-in-Chief of the Army and Navy.

It is a very grave question, whether or not the Court of First Instance is, in any sense, a United States court. It is true that the caption

of the indictment, as of all others, reads "THE UNITED STATES" vs. the accused. But by what authority is the name of the United States used in these islands in criminal prosecutions? The court cites by authority of the United States, but the judge presiding is appointed by the civil governor of the Philippine Islands and holds his commission as a judge of "The Court of First Instance," for a stated district of the Philippine Islands. He is not appointed or commissioned as a United States Judge.

The laws administered are laws of the Philippine Islands, and offenses committed are offenses against the Philippine Islands and the people of those islands.

It would seem therefore that all indictments there should run in the name of the Philippine Islands.

By the act of July 1, 1902, Congress erected a complete civil government for the Philippine Islands. By this act there was established a complete and separate government for the Islands, endowed with all the distinctive functions of government, executive, legislative, and judicial. Congress, then, has legislated,—established a government in and for the Philippines, and conferred other than the usual powers of a territorial government. It is a complete, separate and distinct government of itself, having all the usual machinery for the exercise of its functions, though set

up by the authority of the United States. Such being the case, is not the government, which has been created there, colonial in form, something more than the territorial governments which heretofore have been organized by Congress. We submit that such is the case, and that officers and agents of the United States are not amenable to trial in the courts of the Philippine Governments for acts done in the performance of duties which devolve upon them under the Constitution and laws of the United States upon indictments alleging that such acts constitute infractions of the *Penal Code* of the *Philippine Islands*.

IV.

THE PLAINTIFF SHOULD HAVE BEEN DISCHARGED UPON THE MERITS OF HIS DEFENSE.

(a). *Because his action was justified by the law of self-defense.*

(b). *Because the subject matter of the offense is an act done by a sentinel of the U. S. Army, without malice, and in the honest belief that he was in the performance of his duty.*

For the application of the legal principles involved in the defense of the plaintiff in error, a review of the facts is essential, and we believe is as permissable in this proceeding as in the recent case of *De La Rama vs. De La Rama*, 201 U. S. 203. Especially so in this case—a case of mixed law and fact—involving the liberty of the plaintiff in error, as well as the rights and protection afforded a federal agent while in the performance of his duty.

Let us look at the facts as established, considering the personality of the plaintiff, the duty upon which he was engaged, and the circumstances by which he was surrounded; and, upon the application of the two legal principles involved as to the facts, find his innocence or guilt.

(*a*)

Grafton's act was justified by the law of self-defense.

It appears that the plaintiff is an American born citizen, 23 years of age, who enlisted in the regular army of the United States on the 23rd of July, 1903; and that he was present in the Philippines with his regiment the 12th United States Infantry, by virtue of proper orders issued by authority of the President, the Commander-in-Chief of the Army and Navy.

It has been shown by the evidence that his character from a personal as well as a military point of view, is most excellent; that he was free from vicious habits; and that as a soldier he was steady, cool, and possessed of ordinary firmness, judgment, and prudence. Indeed, his officers testified that, if called upon to select a detachment for service requiring the presence of men in whom these soldierly traits were emphasized, the plaintiff would be among the first of those chosen. See evidence of Captain Wickham, R. 58, Lieutenant Harrell, R. 41, and Sergeant Little, R. 69.

It was further shown, that, as a soldier, the plaintiff had considerable experience, having served formerly with the 9th Infantry in China, and the 1st Infantry in Samar; and that he constituted one of the rescue party, which went to the relief of that small remnant of a company of the 9th Infantry which remained after the massacre of Balangigi—noted as the most dastardly act of treachery which has disgraced the dark and bloody record of the insurrection in the Philippines.

On the 24th of June, 1904, this soldier was duly detailed as a member of the guard at the military reservation, Buenavista Landing, Guimeras Island, Philippine Islands, and at two o'clock p. m., was posted as a sentry on Post No. 1. The duty of the sentry was to guard the garrison, and the military stores and property of the United States.

Post No. 1 extended from a hydrant in front of the Commanding Officer's quarters along a military road for about three hundred yards to a coal pile at the dock, passing between two store-houses midway between its termini. In passing between the two store-houses, the sentry's beat lay close beside the store-house on the south side of the road. At various times during the day the plaintiff had observed what appeared to him and other members of the guard suspicious actions and movements on the part of the native population about the reservation, such as boats leaving filled with women, and returning filled with men; natives carrying bolos, and wearing a sullen expression of countenance. These circumstances excited the suspicion of the plaintiff in error and induced in his mind apprehension of danger, and an honest belief that the garrison was to be attacked by the native population. So strong was this belief developed in the mind of the plaintiff that he reported these suspicious circumstances to the Corporal of the guard at about 2:30 p. m., and requested the Corporal to report the same to Lieutenant Harrell,

the Commanding Officer. See testimony of Private Grafton, R. 71, and Corporal Treadwell, R. 65.

Under these antecedent conditions and circumstances, the plaintiff beheld approaching him upon his beat two natives, unknown to him, but in fact Florentino Castro and Felix Villanueva.

Just before reaching the west end of the store-house, Florentino Castro was observed to draw a large knife or bolo from his bosom and conceal it behind his forearm; and continued walking toward the sentry.

The plaintiff already apprehensive and suspicious, and well aware of the customary methods of attack by bolomen in those islands, quit his beat and obliqued across to the opposite side of the road in order to permit the natives to pass unmolested at a safe distance, if they were so inclined. But, on coming nearly opposite the plaintiff, the natives rushed on him, Florintino leading, with the bolo drawn in his hand for attack. There was no time for hesitation or delay, the safety of the garrison and his own life depended upon the accused, the precious moment for action had come, and he fired two shots in rapid succession, the first upon Florentino and the second upon Felix. Both shots were well directed and proved fatal. The shots were fired from the magazine of the rifle and both were fired in less than five seconds. As told by the plaintiff, R. 70:

A. I was at the end of my post about starting to the west point. I arrived at about half way between Lieutenant Harrell's quarters and the store-house. Two natives came out on my post about half way between the store-house and the coal pile on the left. They had climbed over the stone wall and had passed over my post. They advanced directly towards my post. When I arrived at the corner of the store-house they were about the corner of the same store-house at the other end. Just as I started to cross those stones, a native reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife upon his arm from my view. Upon seeing that I looked back toward the building on the right of the road coming toward the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point toward me and made a rush at me. At the same time, the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the *magazine* and fired at him. The other native jumped back toward the quartermaster building. I loaded my rifle and fired at him. Immediately after firing at the second native I hallowed for the guard. As soon as I hallowed for the guard I looked down in the direction the guard was coming from.

Q. Which native did you shoot first, the one in the middle of the road or the one near the store-house?

A. The one in the middle of the road.

Q. Which one had the knife.

A. The one in the middle of the road.

Q. How close was he to you when you fired?

A. About four paces.

Q. How near to you was he when he fell?

A. Not over five paces.

Q. How near did the knife drop to you?

A. Dropped about midway between us.

This testimony of the plaintiff is confirmed by that of Lieutenant Harrell and Captain Davis, and a number of non-commissioned officers and soldiers as to the number of shots fired, and the locality in the road of the plaintiff and the bodies of the two natives and the knife.

These facts in the main particulars were found by the trial judge to be as stated by the plaintiff.

He, however, found that the natives did not rush the sentinel; that at the time when the first shot was fired the natives were twenty or thirty feet distant from the sentinel; and that upon the firing of the first shot Felix Villanueva turned and fled toward the store-house, crouching beside the wall, and was shot in that position. This too is the theory put forward in the majority opinion of the Supreme Court of the Islands.

These findings were based entirely upon the testimony of two natives—Ambrosio Obidalla and Macario Olbe—who claimed to have witnessed the shooting from the vicinity of the coal pile, a distance of about eighty yards.

It was contended in the court below, and it is urged here that these two natives were not eye-witnesses, and that this story was a bald fabrication.

This contention is based upon the fact that, when they were examined in common with other quartermaster employes, by Captain Hutton, shortly after the incident, they both stated that they knew nothing of the incident, and also upon the contradiction of their testimony by reputable and unimpeachable witnesses. For instance, these two witnesses swore positively that three shots were fired by the plaintiff, while Lieutenant Harrell and Captain Davis, and every reputable witness who took the stand testified that only two were fired. So overwhelmingly was the contradiction of the testimony of these two star wit-

nesses for the prosecution, that the court below was constrained to find that only two shots were fired. Yet, as to the position of the deceased and the plaintiff at the time of firing the shots credence was given to the story of these natives rather than to that of the plaintiff.

But, we would ask, if the first shot was fired when Florentino and Felix were thirty feet distant from the plaintiff, how can the fact be explained that Florentino fell within four feet of the plaintiff, and the knife just at his feet? Did Florentino continue to rush upon the plaintiff after being shot, or was plaintiff's statement correct in this particular?

We therefore ask this court to accept the plaintiff's testimony as true, that the natives were rushing upon him, were within ten feet of him when the first shot was fired, and that Felix was shot as he leaped backward upon the first fire, and not while in a crouching position against the wall of the store-house. Upon these facts it is contended that the plaintiff was excusable by the law of self-defense; that if the fatal shot was fired by the plaintiff without malice, in the honest belief that his life was in danger, and such belief would have been entertained by a person of ordinary reason, firmness and judgment; then the action of the plaintiff is justifiable by the law.

We have seen and it has been found by the court below, that the plaintiff acted without malice—the deceased natives being unknown to

him, and that he acted in the honest belief that his life was in danger. It remains, therefore, to inquire if that belief was reasonable, if it would have been entertained by a man of ordinary intelligence, firmness, and judgment.

It is thought that an answer to this question might be found in the finding of the court, that the plaintiff is *a man "of good intelligence, a steady, capable, and efficient soldier, not easily excited or thrown off his guard," and that he acted in the premises without malice or premeditation.*

This is the strongest evidence as to how a man of ordinary intelligence would act under such circumstances; as we submit that any man who valued his life, who was familiar with the character of the natives, and who had seen their deadly work at Balangigi, would have so acted.

The plaintiff was where he had a right to be, and might rightfully defend himself without retreating. As was said by Mr. Justice Harlan, in *Beard vs. U. S.* 158 *U. S.* 564:

> The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but

> was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

See also *Martin vs. State*, 90 Ala. 602; s. c. 8 So. 858.

State vs. Patterson, 45 Vt. 308.

Karr vs. State, 46, Am. State Reports, 17 (Ala.)

It is urged that Felix Villanueva, the second native, was unarmed, and that having desisted from the attack upon the plaintiff, the firing of the second shot was inexcusable.

This conclusion may seem just and reasonable in the calm judicial atmosphere of the court room, where every circumstance connected with the incident is carefully deposited in the scales of thought, weighed and balanced, and the equation finally calculated after an elaborate consultation of precedents and authorities; but we submit that the case is very different with the man who is present in the face of danger. His thought must be like lightning and his action immediate. Therefore, in judging him, the case should be considered as it appeared to the plaintiff, in what seemed to him, the moment of his dire

necessity, and not as it may be made to appear in court by subsequent investigation and legal research.

This distinction is clearly defined by the Chief Justice in the case of *Allen vs. United States*, 150 U. S. 560.

> We do not think that the doctrine is practicable which tests the question whether a defendant exceeded the limits of self-defense or acted in the heat of passion by the deliberation with which a judge expounds the law to a jury or a jury determines the facts, or with which judgment is entered and carried into execution.

But it was held by the trial judge that though he was inclined to believe "that some demonstration was made with the knife" (by the natives), such demonstration was made in a spirit of sport to see what action the sentinel would take, rather than with any intention on their part to assault him or use the knife upon him and "that they had no further design upon the plaintiff than perhaps to increase his nervous condition by frightening him a little by their action." In other words they designed, according to the learned Justice of the Court of First Instance, to bluff and intimidate a sentinel by making a pretense of a bolo rush upon him, just to see what he would do.

A sense of humor as keen as that of the learned judge of the Court of First Instance would

see nothing but harmless pleasantry in cow-boys shooting up a town, and nothing but an innocent jest in compelling a citizen to dance to the pit-pat of bullets aimed at his toes. Surely there must be a more stable foundation on which to rest the rights of a citizen than a judge's perverted sense of the jocular.

But if such was actually the mental attitude of the Filipinos that does not change the acts done by them. It is the *acts* that Grafton saw; the great Searcher of hearts alone knew the purposes behind the acts; and Grafton was justified in acting upon what he saw and cannot be held to have been obliged to have adjudged the acts innocuous because somebody now, on reviewing the situation, believes that the natives did not actually intend to do what they apparently intended to do.

This suggestion of Judge Bates may be best replied to in the language of Mr. Justice Brewer, in the case of *N. O. & N. E. Railroad Co. vs. Jopes*, 142 U. S. 23, where he draws the following conclusions of law from similar facts:

> In other words, the law of self-defense justifies an act done in honest and reasonable belief of immediate danger. The familiar illustration is, that if one approaches another, pointing a pistol and indicating an intention to shoot, the latter is justified by the rule of self-defense in shooting, even to death; and that such justification is not avoided

> by proof that the party killed was only intending a joke, and that the pistol in his hand was unloaded. Such a defense does not rest on the actual, but on the apparent facts and the honesty of belief in danger.

Grafton's act was without malice as a soldier in the performance of his duty.

GRAFTON WAS A UNITED STATES OFFICER.

The plaintiff should have been acquitted, because at the time of the occurrence he was acting as a federal agent, and the shots were fired in the performance of his duty. This point of plaintiff's defense, which seems to be unanswerable, was completely ignored by the court below, which held that a sentinel is governed in the performance of his duty by the ordinary rules of self-defense as applied to private persons acting in self-defense. We cannot think that such a theory of law, in utter conflict with the authorities, can be affirmed here, but on the contrary, we believe that it will he held here, in accordance with the precedents, that an act done by an officer or agent of the United States, acting under the Constitution and laws of the United States, in the performance of federal duty, is free from criminality; and that such act is justifiable, even though a mistake of judgment is made; provided the officer honestly believes that he is performing his duty. In this connection attention is invited to the following cases: *United States vs. Clark*, 31

Fed. Rep. 710; *In re Neagle*, 39 Fed. Rep. 833; *Cunningham vs. Neagle*, 136 U. S. 1.

In Clark's case, *supra*, Mr. Justice Brown, said:

> In charging the jury in *U. S. vs. Carr*, 1 Woods, 484, (Fed. Cases No. 14732), Mr. Justice Woods instructed them to "inquire whether, at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful * * * But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

Mr. Justice Woodbury in *Wilkes vs. Dinsman*, 7 How. 89, in the opinion at page 130, said:

> The officer being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner

> not confided to him, as with malice, cruelty, or willful oppression, or in the words of Lord Mansfield in *Wall vs. McNamara*, that he exercised it as if "the heart is wrong" (2 *Carr. & Payne*, 158, note). In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error.

And to again quote from the opinion in the Clark case, *supra*:

> I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or, in the words used in the above case, were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice. As there is no reason in this case to suppose that Clark was not doing what he conceived to be his duty, and the act was not so clearly illegal that a reasonable man might not suppose it to be legal,—indeed, I incline to the opinion that it was legal,—and as there was an entire absence of malice, I think he ought to be discharged.

In Clark's case the sentinel had fired upon and killed an escaping prisoner.

In *Cunningham vs. Neagle*, 136 U. S. 1, it being born in mind that Neagle was acting as a federal officer, whose duty it was to guard the person of Mr. Justice Field,—Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States, held:

> The result at which we have arrived upon this examination is, that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justifiable in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

In Neagle's case, Terry, who had struck Mr. Justice Field, had drawn no weapon, and in fact was unarmed at the time when he was killed, but it was held that Neagle was well within the limits of his authority in killing his assailant, if he believed that the life of Justice Field was endangered.

The law of Spain is analogous to that of the United States on this point, for we find it so stated in a case quoted in the "Codigo Penal of Niada,"

Vol. 1, page 133:

> *Question XIV.* When from the record it appears that, by order of the "Teniente Alcalde" of the town, a sworn guard (el guarde jurado) was escorting (acompananado) various persons (sujetos') to the house of the "Alcade" to report to him certain punishable acts that had occurred that night, and that upon passing in front of a tavern, a voice was heard proceeding from a group of persons that were near said tavern, saying "Disarm the Guard", and said group of persons came towards the guard; and that the guard cried out "Halt." which command was not obeyed by said group; and that, on the contrary, they persisted (insistieron) in their purpose (idea); and that seeing this the guard fired one shot at them at a distance of ten or twelve paces wounding three of them in the legs, as a result of which one died, and the other two having been cured before the expiration of ninety days without impediment or deformity resulting therefrom; and given the *illegal aggression* offered the guard and the *want of provocation* on his part, should it be held that there was *reasonable necessity for the means employed to repel said aggression,* and should therefore (the guard) be declared *totally exempt from responsibility* for the same?

The criminal division of the Audencia of Tarragona did not so understand it, for though it acknowledged the presence of the two first requisites in the act, they did not acknowledge the presence of the third; and it accordingly sentenced the accused to six years of "prision correcional." The accused appealed from said sentence, basing his appeal on an infraction of Art. 8, No. 4, of the Code, and the Supreme Court declared him free of all criminal responsibility on the following grounds:

When the trial court acknowledged that the guard Calvet was assaulted by *illegal aggression*, without having *provoked* the *event* even from those who attacked him, in view of the circumstances prior to and contemporaneous with the occurrence, the shot fired with the intent of impeding the proclaimed purpose of his assailants was in every way justifiable, for his character as agent of the laws (autoridad) imposed upon him the obligation to exact respect, and authorized him to repel with the arm placed in his hands for that purpose collective and offensive acts when he saw that his prudent admonition was unheeded both by words and by the persistent attitude of the persons against whom he employed his legal means of defense:

"And whereas, said trial court not having so held, violated No. 4, of Art. 8, of the Penal Code, etc." (Sentence rendered December 18th, 1883, published in the "Gaceta" on March 20th, 1884.)

The court below found that Grafton acted without malice and in good faith, in the honest belief that he was being attacked; and we believe that there can be no doubt in the minds of any member of the court upon this point.

He had been posted to guard the garrison and the property of the United States, and he was there as the representative of the dignity and sovereignty of the United States. An attack upon the sentry was an attack upon the United States and it was his duty to repel any such attack with the arms furnished him for that purpose. But, it is asked, why were not the natives halted before being fired upon? Why? For two very simple reasons. There were no orders for halting persons passing along that road-way in the day time. Hence the sentinel moved out of their way that they might pass in peace; and when he became aware of their deadly intent it was too late for halting. The supreme moment had come—the moment for the performance of duty—the moment for action. Thus it seemed to the plaintiff, and it is respectfully submitted his belief was reasonable.

Plaintiff's action should be judged in the light of the circumstances as they appeared to him at the time. This sober, prudent, steady, and trained soldier, confronting his assailants, was the best judge as to the necessity of his action.

The language of Judge Sawyer, *In re* Neagle, 39 Fed. Rep. 833, is particularly applicable to the plaintiff's case in this respect.

In arriving at his conclusion as to the necessity of Neagle's action, he said:

> But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. * * *
>
> To such, the proper time would never come. Neagle, on the scene of action, facing the party making a murderous assault, knowing, by personal experience, his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms; his readiness to use them, and his angry, murderous threats; and seeing his demoniac looks, his stealthy assault upon Justice Field, from behind, and, remembering the sacred trust committed to his charge, —Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come; and if he honestly acted, with reasonable judgment and discretion the law justifies him, even if he erred.

So we ask the court to hold in this case that, if the plaintiff acted honestly, without malice, and with reasonable judgment in the performance of

his duty, the law justifies him, "*even if he erred.*"

In this connection, it is submitted that it is proper for the court to give consideration to the acquittal of the plaintiff by the court-martial; for, by that acquittal, is shown the opinion of thirteen officers of long service and training in the military establishment as to the reasonableness of plaintiff's action. It is as much as to say that each of these experienced officers, under similar circumstances, would have acted as did the plaintiff.

In this sense, it is thought not improper to ask the court to attach some weight to the judgment of the military court in passing upon the reasonableness of plaintiff's action. As was remarked by Judge Brown in *U. S. vs. Clark*, 31 Fed. Rep. 710:

> At the same time, I think that weight should be given, and in a case of this kind great weight, to the finding, as an expression of the opinion of the military court of the magnitude of Stone's offense, and of the necessity of using a musket to prevent his escape. I am the more impressed with this view from the difficulty of applying common law principles to a case of this description. There is a singular and almost total absence of authority upon the subject of the power of a military guard in time of peace.
>
> But considering the nature of military government, and the necessity of maintaining good order and discipline

> in a camp, I should be loth to say that life might not be taken in suppressing conduct prejudicial to such discipline.

It has been said, however, that the natives only intended to make sport of and to frighten the sentinel by their demonstration with the bolo. It is difficult to believe that this court will give the stamp of its approval to the idea that a sentinel of the United States Army may be made sport of by any one, and least of all in that territory, still rife with ladronism and pulajanism, which are the foster parents of insurrection.

We have been taught to believe the person of a sentinel sacred, that he walks his post clothed with all the authority and power of the Sovereign, entitled to the respect of all, and that no person, high or low, may show him disrespect or "make sport of him."

In the words of Judge-Advocate General Holt, which have been followed for forty years:

> Respect for the person and office of a sentinel is as strictly enjoined by military law as that required to be paid to an officer. As it is expressed in the Army Regulations, "all persons of whatever rank in the service are required to observe respect toward sentinels." Invested, as the private soldier frequently is while on his post, with a grave responsibility, it is proper that he should be fully protected in the discharge of his duty. To permit any one of whatever rank,

> to molest or interfere with him while thus employed, without becoming liable to a severe penalty, would obviously establish a precedent highly prejudicial to the interests of the service.

Those, therefore, who undertake to molest sentinels do so at their own risk, and abide by the just consequences of their temerity. Consequently, even if the two natives were only "making sport" of the plaintiff, his action was both reasonable and justifiable, and should justify him before the law.

CONCLUSION.

In conclusion we would summarize briefly:

JEOPARDY.

Our contention of jeopardy rests on the following:

1. On both the Federal Constitution and the Philippine Penal Act.

2. The 62d Article of War gives to courts-martial jurisdiction of crimes that are less than capital.

3. Manslaughter is not a capital crime.

4. Courts-martial have jurisdiction of crimes that are also military offenses.

5. The shooting of a man by a sentinel, if a crime at all, is certainly a military offense.

6. The doctrine that one act may offend two sovereigns and hence may result in two lawful trials, cannot here apply, because there was here but a single sovereign, the United States; and indeed both prosecutions were in the name of the United States.

7. The act for which Grafton was tried was the same in both cases.

8. The situation is not changed by the fact that in one indictment the charge was manslaughter and in the other, assassination.

9. By the court-martial it was found that he was not guilty of the crime of manslaughter in killing Felix Villanueva.

10. Manslaughter is not murder, but every ingredient of the crime of manslaughter is necessary to constitute the crime of murder. If guilty of murder he was guilty of all the things that constitute the crime of manslaughter and something more.

11. Having been acquitted by the court-martial he was adjudged by a court of competent jurisdiction to be innocent of certain things (the things involved in manslaughter) of which he must be guilty, before he can lawfully be found guilty of the crime of murder.

RIGHT TO JURY TRIAL.

When tried by any court other than a court-martial a soldier who is also a citizen of the United States, is entitled to a trial by jury.

1. If a resident within the United States, he, without question, is entitled to a jury under the Constitution.

2. When he enlisted, to uphold the Constitution, he lost no right under it, save the single one he voluntarily surrendered, to-wit: a jury trial when tried by a court-martial.

3. He was a citizen before he was a soldier and in becoming a soldier only lost the one right above named.

4. He did not go to the Philippine Islands of his own volition, but by the orders of the authorities over him, who must act under the Constitution.

5. The power given to those authorities is no greater and no more perfect than the rights that the same Constitution gave to Grafton.

6. Grafton had no right under the Constitution to disobey the orders of his superior officers; and those officers had no right under the Constitution to compel him to go where he would be deprived of his privileges under the Constitution.

7. Wherever he went by virtue of Constitutionally authorized orders he was under the pro-

tection of the Government resting on that Constitution, and was entitled to every privilege (not voluntarily surrendered) that belonged to any citizen of the United States, wherever that citizen might be.

8. If in a foreign country as a result of such orders, and acting thereunder, it was his government's duty to protect him in every right that was his when he was ordered to that foreign country.

9. The doctrine of exterritoriality shows that international law recognizes the soundness of this principle.

10. The duties of the Government and the citizen are reciprocal; the citizen obeys; the Government protects; and it fails of its duty if its protection does not secure to the citizen every right belonging to him.

11. It is conceded that under the Constitution the United States Government has the power to acquire territory, by conquest or purchase. Upon the acquisition of such territory and of dominion over it, it may be conceded, that the Government can determine the status of those persons who were inhabitants of that territory prior to its acquisition and remain such after. And the reason for this lies in the fact that Article IV of the Constitution provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory

or other property belonging to the United States." This is a recognition of a governmental fact which must have been recognized even without express constitutional declaration. For, conceding that the United States is a sovereign, we must accord to it all the attributes of sovereignty, and one of these is the power to make war, and, the acquisition of territory by conquest may always be an incident of war. But after such territory has been acquired, even though the inhabitants thereof are *not* citizens of the United States and are not accorded any of those rights which the Constitution guarantees to the citizens of this nation, can it be said, even though all this be so, that this acquisition of territory can change the status of a *man who was a citizen of the United States before* the acquisition took place? Of course the answer to that question must be: "No." That being so, Grafton was, if nothing else, a citizen of the United States dwelling in a territory whose native inhabitants were not entitled to any constitutional rights, if you please, but a territory that was ruled over and governed by the Government of the United States, whose government springs from and rests upon this very Constitution. Now can it be that the United States Government, prohibited by the instrument that gives it birth from denying any of its citizens a trial by jury, is able to deprive the citizen of that constitutional right in one place, over which that government had absolute dominion, though it cannotin another? It might be conceded that our government could refuse to give what non-citizen

subjects never had; but that is quiet a different thing from taking from a citizen of the United States a right that is his, given and guaranteed by the Constitution, simply because he chances to be in the back room of the nation's mansion instead of the parlor.

It must be borne in mind that the denial of this right of a trial by jury came from a tribunal erected by the United States Government. If this right is taken from him it is taken from him by an instrumentality of the United States Government, and so by the United States Government itself. And then what have we? We have a government existing by virtue of the Constitution, limited by the Constitution, one of which limitations is that a citizen of the United States shall not be deprived of a trial by jury and the courts saying of that government: "In some places, it must observe the limitations placed upon it by the instrument by which alone it lives, but in other places it need not; that the simplest of English phrasing means one thing by the shores of the Atlantic and another in the far-off islands of the sea."

Again: Article I of the Constitution, in enumerating the powers of Congress, declares that "Congress shall have power * * * To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States * * "

The District of Columbia is such territory. Could there be given more complete power than is given to Congress with relation to the District of Columbia? Can it be thought for one moment that this full and ample grant of power is less than that given by that other clause: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory belonging to the the United States"? This last clause, it must be remembered, is the sole authority for the present Philippine government. And yet, who would have the hardihood to say that Congress has the power to erect within the shadow of this capital, a Court of First Instance, and clothe it with the power to try men for capital and other infamous crimes without the intervention or presence of a jury? The question carries its answer with it. And yet the words of this immortal instrument on the lips of a representative of the United States Government, and above all upon the lips of its judiciary must mean the same whether they be spoken where shines the pale Pole-star or where shimmers the Southern cross.

EXTERRITORIALITY.

This doctrine is basic in international law. An Army in a foreign country can yield obedience to no authority save that of its own officers. Any other rule would make impossible the preservation of the army's integrity. If the foreign government may arrest one soldier, it can arrest every soldier in the army, and thus the army be disbanded.

If the army is in a hostile country it surely owes no duty to the government of such country. If the army is in a friendly country, its government will not and cannot ask the army's commander to yield up his soldiers to such country's government.

The Philippine Islands are either domestic or foreign territory. If domestic the Constitution attaches. If foreign it is either a friendly or a hostile country. If hostile the army owes no duty to its government. If a friendly foreign country its government violated fundamental international law in attempting to exercise criminal jurisdiction over a soldier in our army.

If it was neither foreign nor domestic territory, but a no-man's land, the army marching under the authority of the Constitution bore with it, for the benefit of every citizen soldier composing that army, every right which belonged to each citizen soldier when the march began.

MERITS.

The De La Rama case, 201 U. S. 303 (s. c. 50 L. Ed. 765), makes it proper for, and the gravity of this case makes it the duty of, this Court to examine the facts in this case.

And in the event that case should be deemed not authority for an examination of the facts it is respectfully submitted that an examination of them is wise to this end: That if it is made

manifest that a grievous wrong has been committed that fact is bound to and should weigh with the court in passing upon the closely controverted points of law.

And when examined they disclose:

1st. That Grafton had seen the horrors of Samar where thirty or forty American soldiers had been surprised, rushed and slaughtered by bolomen, and their bodies subjected to unprintable mutilation.

2d. That he was apprehensive of danger and that such apprehension was well founded:

a. On the foregoing.

b. The known tendencies of the natives.

c. The women leaving the village in boats.

d. The return of the boats filled with men; *the very thing that would happen if hostilities were contemplated.*

e. The sullen aspect of the natives.

f. He was part of a small detachment of twenty-odd men two and a half miles from the main body of troops.

3d. The close proximity of the bolo and the body of the man who carried it to the sentinel, show how real the danger was.

4th. The two shots were the result of a single mental impulse occasioned by well founded fears and the murderous assault.

How could Grafton know that Villanueva was unarmed? He rushed forward with the other bolo man and only jumped back when the other had been shot.

5th. Grafton could not know but that many natives were concealed behind the ware-houses and the thickets close by.

6th. The two natives whose evidence was given as the foundation for conviction, were contradicted by every white witness, disbelieved by the Court as to the number of shots fired, and the evidence further shows that ten days after the trouble they said that they knew nothing about the matter, about which three months later they testified. Credibility's self, unwarped, would not have believed them.

Such a judgment could never have passed uncondemned in our wholesome American atmosphere.

Can it be that distance can so refract the rays of justice that such a judicial distortion can become a sanctioned fact.

Can it be that the power of this central body of our judicial system to enforce recognition of its doctrines, diminishes as the square of the distance increases?

We respectfully submit the judgment should be reversed and the prisoner discharged.

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